Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1751

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

THOMAS CONYERS,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	3
Constitutional Provisions Involved	3
Statement of the Case	4
The Evidence at Trial	4
The State Appellate Proceedings	6
Reasons for Granting the Writ	8
Conclusion	14
Appendices:	
A—Court of Appeals Opinion	1a
B—Court of Appeals Remittitur	32a
C—Appellate Division Order and Opinion	34a
D—Trial Transcript (Excerpted portions)	43a

TABLE OF AUTHORITIES

PAGE

Cases:

Doyle v. Ohio, 426 U.S. 610 (1976) 6, 8, 9, 11

Griffin v. California, 380 U.S. 609 (1965) 12

Jenkins v. Anderson, No. 78-6809, 26 CrL 4160 (argued 1/8/80) 10, 13

McGautha v. California, 402 U.S. 183 (1971) 12n
Miranda v. Arizona, 384 U.S. 436 (1966) 9n

People v. Adams, 73 A.D.2d 525, 422 N.Y.S.2d 406 (1st Dept. 1979) 11
People v. Rothschild, 35 N.Y.2d 355, 320 N.E.2d 639, 361 N.Y.S.2d 901 (1974) 8
People v. Streeter, 67 A.D.2d 877, 413 N.Y.S.2d 690 (1st Dept. 1979) 11
People v. Antonio Urbina, Ind. No. 0798/76 (appeal pending before Appellate Division, First Department) 11

Raffel v. United States, 271 U.S. 494 (1926) 11

Williams v. Florida, 399 U.S. 78 (1970) 12n

Constitution:

U.S. Constitution, 5th Amendment 3
U.S. Constitution, 14th Amendment 4

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To: The Honorable Chief Justice
and the Associate Justices
of the Supreme Court:

The petitioner, the State of New York, respectfully prays that a writ of certiorari issue to review the January 8, 1980 opinion of the Court of Appeals of the State of New York in the above case.

Opinions Below

The opinion of the Court of Appeals is reported at 49 N.Y.2d 174, 400 N.E.2d 342, 424 N.Y.S.2d 402 (1980) and is also set forth as Appendix A. The order and opinion of the New York Supreme Court, Appellate Division is reported at 65 A.D.2d 437, 411 N.Y.S.2d 303 (1st Dept. 1978) and is also set forth as Appendix C.

Jurisdiction

On January 8, 1980, the New York State Court of Appeals affirmed an order of the New York Supreme Court Appellate Division, First Department reversing respondent's conviction. The court, in a 4-3 decision held that respondent's right to due process of law, and his privilege against self-incrimination, had been violated when the prosecutor cross-examined him about his silence at the time of arrest. The prosecutor's inquiry had focused on respondent's failure immediately to tell the officer who arrested him at the scene of the crime and did not give him *Miranda* warnings, the exculpatory story to which respondent testified at trial.

In its decision, the Court of Appeals referred to both the federal and state constitutional privilege against self-incrimination and right to due process. Despite these references to the State Constitution, it was clear that the court had affirmed the reversal of respondent's conviction on constraint of this Court's decisions interpreting the Fifth and Fourteenth Amendments. Consequently, petitioner moved to have the court amend its remittitur to reflect that it had

necessarily passed upon federal constitutional questions. In opposing that motion, respondent argued that the federal authorities referred to by the majority were discussed in only general terms, and were not necessary to its judgment, which was solely on state grounds. The court rejected respondent's argument and on March 20, 1980, it amended its order to reflect that it had necessarily passed upon a question under the Constitution of the United States (The amended remittitur is set forth as Appendix B).

On March 27, 1980, Mr. Justice Marshall signed an order extending the time for filing the petition for certiorari to and including May 5, 1980. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Question Presented

When a defendant, who was arrested as he fled from his robbery victim and was not given *Miranda* warnings, testifies at trial that he was the victim rather than the perpetrator of the crime charged, is it a violation of due process or the privilege against self-incrimination to cross-examine defendant about his failure immediately to tell that story to the arresting officer?

Constitutional Provisions Involved

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * compelled in any criminal case to be a witness against himself.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Statement of the Case

The Evidence at Trial

At approximately 1:30 p.m. on August 28, 1975, Mr. Marion Dantzler and Mrs. Grace Johnson were standing and talking in front of an apartment building in Manhattan, when they were approached by the respondent, Thomas Conyers, and his co-defendant below, Arthur Saunders. Conyers and Saunders ordered Dantzler and Johnson into the hallway of the building and, once inside, Saunders drew a pistol. Conyers and Saunders then stole money from Dantzler's pocket and a small purse containing cash from Johnson. They tied Johnson's and Dantzler's hands and feet, forced them to lie down, and ran from the building. As the defendants fled from the building, Dantzler untied himself and ran in pursuit.

Dantzler chased the defendants for one block. He then enlisted the aid of a tow truck operator who drove Dantzler one more block where Dantzler resumed his chase on foot. During the brief chase, one of the defendants fired a gun at Dantzler without hitting him. As the chase continued, Saunders appeared to hand the gun to Conyers who, moments later, was apprehended by a police officer who seized the gun. Saunders continued to run for another block until he too was stopped by an officer. Both defendants were brought to the precinct where they were identified by Dantz-

ler and Johnson. A piece of rope resembling one found on Dantzler's wrist was seized from Saunders, and a black vinyl purse containing cash was recovered from Conyers.

For the first time at trial, Conyers testified that far from being the aggressor, he was the innocent victim of Marion Dantzler's attempt to cheat him out of a gambling debt by threatening him with a gun. According to Conyers, Dantzler had initially offered to pay the debt by telling Conyers to take the money contained in a black vinyl change purse in Dantzler's apartment. However, when Conyers reached for the purse, Dantzler drew a gun. As Conyers grabbed the gun from Dantzler, it accidentally discharged. Conyers seized the gun and the change purse, and Saunders tied Dantzler's hands. They then fled from the apartment to the street.

Shortly after Conyers and Saunders reached the street, they heard Dantzler shouting and chasing after them. Conyers testified that as he ran from Dantzler, he saw a police car parked ahead. Conyers then heard Dantzler call out to the police that he, Dantzler, had been robbed. Conyers dropped the gun as he was stopped by the police.

On cross-examination, the prosecutor asked Conyers whether he had run toward the police car when he first saw it. Conyers said that he had not. She then asked Conyers if he had ever told the police that he had seized the gun from Dantzler in self defense (Trial Transcript, herein set forth at Appendix D, p. 43a). Defense counsel objected to the question on the ground that "Defendant is advised of his right not to talk to the police." (There was no testimony that defendant had received the *Miranda* warnings.)

Following a bench conference, the trial court overruled counsel's objection (App. D, pp. 43-44a). Conyers answered that he had never told this story to the police. The prosecutor then asked Conyers if he had ever attempted to press charges against Dantzler. Again, over objection, he gave a negative response (App. D, p. 45a). In summation, to which an exception was subsequently taken and overruled, the prosecutor argued that Conyers' responses to these questions demonstrated the falsity of his trial story (App. D, pp. 44-46a).

On March 16, 1976 the jury convicted defendant of robbery and related crimes.

The State Appellate Proceedings

Relying exclusively upon *Doyle* v. *Ohio,* 426 U.S. 610 (1976), the Appellate Division, First Department held that the prosecutor's cross-examination and summation deprived respondent of his federal constitutional right to due process, and penalized him for exercising his Fifth Amendment right to remain silent "when he [was] under police custodial interrogation" *People* v. *Conyers* (App. C, p. 40a).

On appeal to the New York State Court of Appeals, petitioner argued that, when respondent testified at trial that he was the victim rather than the perpetrator of the crime charged, he could be asked about his failure to tell that story to his arresting officer. Petitioner contended that this Court's decision in *Doyle* v. *Ohio,* 426 U.S. 610 *supra* did not preclude such cross-examination because *Doyle* con-

cerned a defendant who had been given *Miranda* warnings at the time of his arrest, and who therefore had a right to believe that his silence would not be used against him. Respondent, however, was arrested on the street while fleeing from his victim. At the time he was arrested, the police had not yet had an opportunity to give him *Miranda* warnings. Consequently, unlike *Doyle,* respondent had not been encouraged by the police to remain silent or led by them to believe that his silence would not be used against him.

In a 4-3 decision, the New York Court of Appeals affirmed the order of reversal. The majority held that respondent's Fourteenth Amendment right to due process of law and his Fifth Amendment privilege against self-incrimination had been violated by cross-examining him about his silence at the time of arrest.* The dissenting judges argued that neither the due process clause nor the privilege against self-incrimination prohibited the contested cross-examination. According to the dissenters, to refuse to permit the jury to consider respondent's failure to exculpate himself at the time of arrest is "to provide defendants with a license to lie . . ." (App. A, p. 13a). The dissenters went on to distinguish this case from *Doyle,* and said that there is no unfairness when *Miranda* warnings have not been given.

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* Although the court's opinion cited both the State and Federal Constitutions it subsequently amended its remittitur to reflect that the decision was controlled by resolution of the federal constitutional questions. (See p. 3 *supra* and App. B, p. 32a).

Reasons for Granting the Writ

There were two distinct bases for the New York Court of Appeals decision in this case: First, the court held that it is fundamentally unfair to ask a criminal defendant who testifies at trial that he was the victim rather than the perpetrator of the crime charged, why he did not tell that story to his arresting officer. According to the court, such cross-examination is a violation of due process even if the defendant had not yet been made aware of his right to silence by *Miranda* warnings at the time of arrest. Second, the court ruled that cross-examination about post-arrest silence unconstitutionally penalizes a person for exercising the privilege against self-incrimination. As shown below, this case raises substantial constitutional issues, resolution of which will affect profoundly the administration of justice in New York.

(1) In 1974, the New York Court of Appeals held unanimously that a police officer, on trial for bribery, could be cross-examined about his post-arrest silence. *People* v. *Rothschild,* 35 N.Y.2d 355, 320 N.E.2d 639, 361 N.Y.S.2d 901 (1974). Yet, in its due process discussion, the court did not even attempt to distinguish this case from its decision in *Rothschild* (*see* App. A, p. 4a). It simply pointed to *Doyle* v. *Ohio,* 426 U.S. 610 *supra* as a "subsequent refinement in criminal law and practice" which "impelled" it to re-examine *Rothschild* (*id.*).

The majority reasoned that a person who is taken into custody at the scene of the crime is aware of his right to remain silent even if that awareness does not come from

explicit warnings. Consequently, it would be fundamentally unfair to give a defendant the right of silence, and then to penalize his exercise of that right by permitting the prosecutor at trial to ask the defendant about his silence at the time of arrest.

Clearly then, the Court of Appeals abandoned a six year-old precedent on the basis of its interpretation of this Court's decision in *Doyle* v. *Ohio, supra.** *Doyle,* however, concerned a defendant who had been given his warnings when he was arrested. This Court held that it would be a violation of due process to advise a defendant of his right to remain silent and then to use that silence against him for impeachment purposes. Here, the respondent was arrested while fleeing from his victim. In the immediacy of the circumstances of a street arrest, the police did not advise him of his right to remain silent.

Notwithstanding that respondent, unlike *Doyle,* had not been encouraged to remain silent by police warnings, the court below held that this Court's decision in *Doyle* prohibited cross-examining respondent about his silence when first confronted the police. The majority asserted that even in the absence of explicit warnings, the right to silence is a "matter of common knowledge."** Hence, according

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* In petitioner's motion to have the Court of Appeals amend its remittitur, we pointed out that the sole basis for the court's having abandoned the precedent of *Rothschild* was the decision in *Doyle* v. *Ohio, supra.* The court thereafter acknowledged that *Doyle* was the predicate for its due process holding by amending its remittitur as requested.

** The majority's reference to the "common knowledge" of the right to remain silent is curious, because the very premise of this Court's decision in *Miranda* v. *Arizona,* 384 U.S. 436, 468-69 (1966), is that it cannot be presumed that a defendant knows his rights when arrested. *See also People* v. *Conyers,* App. A, p. 16a (Meyer, J. dissenting).

to the court below, due process is violated anytime silence at the time of arrest is used for impeachment purposes. This reasoning goes far beyond the holding in *Doyle* and thus presents this Court with an opportunity to itself define the scope of its decision in *Doyle*.

Indeed, this case is a logical one for the Court to review in view of the presently pending case of *Jenkins* v. *Anderson*, No. 78-6809, 26 CrL 4160 (argued 1/8/80). *Jenkins* raises the issue of whether due process was violated when a defendant in a murder case was cross-examined and the prosecutor commented in summation about his failure to come forward to the police with his self-defense story between the time of the killing, and defendant's voluntary surrender some two weeks later. If this Court holds that such cross-examination does not violate due process, it should then grant certiorari in this case rather than remanding it for consideration in light of the decision in *Jenkins*.

The reason for not remanding this case, is that it presents the last of three recurring factual situations involving an accused's silence and subsequent cross-examination about that silence. The first, pre-custody silence, is the situation which will be addressed in *Jenkins*. The second, post-arrest silence after *Miranda* warnings have been given, is the situation addressed in *Doyle*. The third and last situation involves silence at the time of arrest before the police have had an opportunity to give *Miranda* warnings. That is the situation which is presented by this case. By granting certiorari, this Court can decide whether, in that final factual situation, due process precludes cross-examining a defendant about his silence at the time of arrest.*

* Even if the Court holds in *Jenkins* v. *Anderson*, *supra*, that the defendant's due process rights were violated by cross-examining him regarding his pre-custody silence, we respectfully request that we be given an opportunity to demonstrate why certiorari should nonetheless be granted in this case.

Notably, the immediate street arrest of a person who has just committed a crime occurs daily in New York City alone. And at trial, there is a recurring scene of that person telling a story which could be better evaluated by the jury if they knew that this story had not been told to the police at arrest. *See, e.g., People* v. *Adams,* 73 A.D.2d 525, 422 N.Y.S.2d 406 (1st Dept. 1979); *People* v. *Streeter,* 67 A.D.2d 877, 413 N.Y.S.2d 690 (1st Dept. 1979); *see also People* v. *Antonio Urbina,* Ind. No. 0798/76 (appeal pending before Appellate Division, First Department). Certainly, it is a provident exercise of certiorari jurisdiction to determine whether the New York Court of Appeals was correct when it concluded that this Court's decisions mandated that: criminal defendants be permitted to take the stand and offer a completely fabricated exculpatory story without fear that they will be asked about their failure to have told that story to the arresting officer.

(2) Independent of the due process rationale, the New York Court of Appeals precluded the cross-examination in issue for a second reason (*see* App. A, p. 8a, fn. 2). The court held that use of respondent's silence at the time of arrest penalized him for exercising his Fifth Amendment privilege against self-incrimination.*

The court's holding represents a substantial and novel expansion of the privilege.** First, as noted by the dissenters, the privilege protects against compulsory self-incrimination (App. A, p. 14a). Here it is difficult to see

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* Significantly, this Court expressly declined to rest its decision in *Doyle* v. *Ohio* on the Fifth Amendment (see 426 U.S. at 616 fn. 6; *see also id.* at 620 and 626 [Stevens, J. dissenting]).

** The holding may also be in conflict with this Court's decision in *Raffel* v. *United States,* 271 U.S. 494 (1926). (*See* 426 U.S. at 628 [Stevens, J. dissenting].) The majority below took parenthetical note of *Raffel,* but did not discuss it other than with a "Cf." (App. A, p. 11a).

the compulsion which would give rise to a violation of the Fifth Amendment.

The majority below seemed to find the compulsion by reasoning that if defendants who testify at trial can be cross-examined about their silence at the time of arrest, persons will be forced into the intolerable position of having to choose between speaking when arrested and possibly incriminating themselves, or remaining silent and risk having their silence subsequently used against them at trial. To support their argument, they relied upon *Griffin* v. *California,* 380 U.S. 609 (1965). *Griffin,* however, concerned prosecutorial comment at trial on defendant's failure to take the stand. Such comment, held this Court, "is a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614.

To be sure, in a trial situation, a defendant may well feel compelled to testify and waive his privilege solely to rebut the inference of guilt inherent in prosecutorial comment on his failure to testify. By contrast, it is difficult to believe that a person in custody rather than saying nothing will feel compelled to speak up because he is somehow aware that if he subsequently testifies at trial, he may be called upon to explain his silence. Put simply, it is difficult to see how cross-examination at trial about post-arrest silence will "cut down on the privilege" at the time of arrest.*

* The majority below balanced the probative value of respondent's silence against the burden on the exercise of the privilege. It held that the probative value was outweighed by the penalty imposed on the privilege (App. A, pp. 8-11a). Yet, even if allowing cross-examination about prior silence would place some burden on the defendant's choice to remain silent, not every burden on the exercise of a constitutional right is impermissible. *See, e.g., McGautha* v. *California,* 402 U.S. 183, 210-13, 217 (1971); *Williams* v. *Florida,* 399 U.S. 78, 83-4 (1970).

That the Fifth Amendment issue is a substantial one is demonstrated by the pending case of *Jenkins* v. *Anderson*, No. 78-6809, *supra*. There, the Court is considering whether cross-examination and summation about a defendant's pre-custody silence violates the Fifth Amendment. If the Court holds that Jenkins's Fifth Amendment rights were not violated, it should nonetheless review this case and not remand it in light of *Jenkins*.*

Review rather than remand is appropriate because as discussed earlier, there are three recurring factual situations in which impeaching a defendant with his silence may violate the privilege against self-incrimination: Pre-custody silence, as in *Jenkins;* post-arrest silence after *Miranda* warnings have been given, as in *Doyle;* and post-arrest silence where there has not been an opportunity to give *Miranda* warnings, as in this case (*see* p. 10, *supra*). After the *Jenkins* decision, there will remain only the third situation. This case thus presents an ideal fact pattern on which to resolve the remaining substantial Fifth Amendment issue with respect to the use of silence. And, as in the due process situation, the New York Court of Appeals's conclusion about this Court's view of the Fifth Amendment, will severely hamper the administration of justice in New York (*see* p. 11 *supra*).

* * *

In sum, this case presents two related constitutional questions: First, where an arrested person who has not been advised of his right to remain silent testifies to an

* Again, even if the Court holds in *Jenkins* that the defendant's privilege against self-incrimination was violated, we respectfully request an opportunity to demonstrate why this case nonetheless calls for a grant of certiorari.

exculpatory version of events at trial, is it a violation of due process to ask him about his failure to tell a similar story at the time of arrest before he had been advised of his rights? Second, is such silence "compelled" so that its use for impeachment purposes violates the privilege against self-incrimination? These questions have not been addressed by this Court and they concern a situation common to criminal prosecutions throughout the United States.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 1980

Appendices

APPENDIX A

Opinion of the New York State Court of Appeals

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

vs.

THOMAS CONYERS,
Respondent.

decided January 8, 1980

GABRIELLI, J.

Thomas Conyers was convicted in Supreme Court, New York County, of several crimes allegedly committed during and immediately following the armed robbery of Marion Dantzler and Grace Johnson. During his trial, Conyers testified on his own behalf that in fact there had been no robbery and gave a description of the events leading to his arrest which differed significantly from that provided by Dantzler and Johnson. The prosecutor was allowed to cross-examine Conyers, over a timely defense objection, concerning his failure to inform the police of his version of the incident at the time of his arrest. Conyers' silence was also the object of comment by the prosecutor during summation. Upon defendant's appeal to the Appellate Division, that court concluded that Conyers was deprived of a fair trial because of the inquiry into his assertion of

his right to remain silent. Accordingly, the Appellate Division reversed the judgment of conviction and ordered a new trial. The People now appeal to this court. For the reasons discussed below, we conclude that there must be an affirmance.

At issue on this appeal is the propriety of prosecutorial use, for impeachment purposes only, of a defendant's silence at the time of arrest. We note that it has long been and remains the law in this State that a defendant's silence cannot be used by the People as a part of their direct case (*People v Rutigliano,* 261 NY 103). Thus, our inquiry today is limited to the use of a defendant's silence for impeachment purposes when that defendant testifies at his trial. We are persuaded that a defendant's silence at the time of his arrest may not be used against him even for impeachment purposes, since such use would violate due process and would improperly penalize a defendant for the assertion of a basic constitutional right.

The course of events which culminated in defendant's arrest was the subject of considerable dispute at his trial. Dantzler and Grace testified that Conyers and a codefendant, Arthur Saunders, had accosted them on a New York City street and forced them at gunpoint into the hallway of a nearby apartment building, where Dantzler and Grace were robbed and bound. Dantzler managed to escape his bonds, and gave chase to Conyers and Saunders. In the course of that pursuit, one of the defendants fired a shot at Dantzler. The chase ended with the arrival of the police, who immediately arrested Conyers and Saunders. There were no other witnesses to the alleged robbery itself, al-

though several witnesses did support parts of Dantzler's description of the chase.

Both Saunders and Conyers testified at their joint trial.[1] Their version of the incidents preceding their arrest was somewhat different from the tale told by Dantzler and Johnson. According to the defendants, they had visited Dantzler in his apartment in order to collect Conyers' winnings on a bet placed with Dantzler the previous day. An argument developed over whether Conyers was entitled to the money, and eventually Dantzler pointed to a pouch on a table and told Conyers to take the money in the pouch. As Conyers reached for the pouch, Dantzler drew a gun, which Conyers then kicked out of his hands. Conyers and Saunders bound Dantzler and left the building with the pouch and the gun. They soon noticed Dantzler chasing them, and began to run until they were stopped by the police.

The prosecutor sought to discredit the defendants' explanation of their encounter with Dantzler as being a recent fabrication. To this end, Conyers was cross-examined about his failure to explain the situation to the police when he was arrested. A defense objection to this line of questioning was overruled, and the prosecutor subsequently referred to Conyers' silence during summation. Defendant contends that his assertion of the right to remain silent at the time of his arrest should not have been used against him even for impeachment purposes. We agree.

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1. Saunders was also convicted, but his conviction was affirmed by the Appellate Division and leave to appeal to this court was denied (*People v Saunders*, 63 AD2d 868, mot for lv to app den 44 NY2d 956). We note that the issues presented on this appeal were not raised by Saunders on his appeal.

Proceeding immediately to the central legal dispute presented by this appeal, initially we recognize that in *People v Rothschild* (35 NY2d 355) we sustained the larceny conviction of a police officer although the People had been allowed to cross-examine the officer concerning his silence at the time of his arrest in an attempt to impeach his claim at trial that he had been engaged in a police undercover operation and had not actually been seeking to obtain money illegally. While the *Rothschild* case might at first glance seem to resolve the instant dispute, we note that the circumstances surrounding that case were unusual since the officer was under a duty to inform his superiors of his undercover activities, and thus his continued silence in the face of accusation by his fellow officers was extraordinarily probative. Since our decision in *Rothschild,* we have expressly stated that "[t]he fact that a defendant is silent at the time of arrest may not be used to impeach him at trial" (*People v Arce,* 42 NY2d 179, 187). Moreover, the Supreme Court has recently concluded that the use of silence to impeach the testimony of a defendant who was given the warnings mandated by *Miranda v Arizona* (384 US 436) is violative of due process (*Doyle v Ohio,* 426 US 610). Hence, we are impelled to re-examine our decision in *Rothschild* in light of subsequent refinements in criminal law and practice.

In *Doyle v Ohio* (426 US 610, *supra*), the Supreme Court held that where a defendant has been provided with the warnings mandated by *Miranda,* and thus has been impliedly promised that his silence would not be used against him, it would be fundamentally unfair to then allow that silence to in fact be used to the detriment of the accused even for

the limited purpose of impeachment. In the instant case, it would appear that the police failed to provide Conyers with *Miranda* warnings. The People suggest that this factual distinction justifies a different result. In esssence, the prosecution argues that where *Miranda* warnings have not been given, the accused does not receive any implied promise that his silence will not be used against him, and thus the use of that silence for impeachment purposes does not run afoul of any concept of fundamental fairness and is not violative of due process. We disagree. It would appear rather anomalous to "reward" improper police practices by allowing the existence of such impropriety to serve as the justification for admitting evidence otherwise inadmissible. Although *Miranda* does not mandate suppression of statements made by an accused who has not been informed of his rights if those statements have not been elicited by police interrogation, it remains good practice to inform an accused of his rights as soon as is possible. More significantly, the implied promise, contained in the *Miranda* warnings, that one's silence will not be used against one, is derived not from the words of the *Miranda* warnings, but from the actual constitutional guarantees which they express. Thus, regardless whether that promise is repeated by the police in the form of *Miranda* warnings, each and every citizen has already been made just such a promise by the State. That promise is contained in the privilege against self incrimination provided by both the Federal and State Constitutions (US Const, 5th Amdt; NY Const, art I, § 6). The State has promised each of its citizens, by ratification of those constitutional provisions, that he may remain silent in the face of accusation. Having made that promise, the State may

not, consistent with any concept of fundamental fairness and due process, subsequently renege on that promise by utilizing a defendant's silence against him. The implied promise made to a suspect when he is given *Miranda* warnings merely repeats and reiterates the promise already made by both our Constitutions. Although it is necessary to repeat that promise in order to ensure that the suspect fully understands his constitutional rights, the failure of the police to do so does not serve to prevent a suspect from relying upon that promise. Moreover, it is a matter of common knowledge that a person who is arrested is not required to speak to the police, and that his silence may not be used against him. This is not an arcane legal principle known only to the learned, but rather is familiar to most citizens. For purposes of a due process analysis based on the unfairness of capitalizing upon the accused's accurate appreciation and exercise of his basic constitutional rights, we deem it irrelevant whether that knowledge was imparted by the police, as is required by law, or was absorbed from our common culture (see, also, *Douglas v Cupp,* 578 F2d 266, cert den 439 US 1081). In short, we conclude that the use for impeachment purposes of an accused's silence at the time of his arrest is violative of due process.

There exists, moreover, another reason for precluding use of a defendant's silence for impeachment purposes. It is basic to our system of criminal justice that an accused may not be compelled to incriminate himself (US Const, 5th Amdt; NY Const, art I, § 6). While proper application of this principle may vary with the context in which it is sought to be utilized, there can be no doubt but that at the

most basic level it provides an accused with the right to remain silent in the face of interrogation or accusation. Any attempt to penalize a person for the exercise of this fundamental right must be scrutinized with extreme care. It is for this reason that in New York it has long been the law that evidence of silence at the time of an arrest may not be used as a part of the prosecution's direct case. As we declared in *People v Rutigliano* (261 NY 103, 107, *supra*), "No cautious person, when in custody accused of crime would care to enter into a discussion of his guilt or innocence with his captors and co-defendants, when what he said might be used against him * * * He is then under no duty to speak and his silence should not be counted as giving assent to what he hears. If he had counsel, he would doubtless be advised not to talk. If he had not, he should not be prejudiced thereby".

Similarly, in *Griffin v California* (380 US 609) the Supreme Court forbade comment during trial about a defendant's decision to exercise his privilege against self incrimination by not taking the stand on his own behalf. The court found such commentary to be objectionable because "[i]t is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly" (380 US, at p 614).

These cases, of course, do not resolve the controversy concerning use of a defendant's silence at the time of arrest to impeach his credibility, for in both *Griffin* and *Rutigliano* the defendant's decision to exercise his privilege was sought to be used as a part of the direct prosecution case, not merely for impeachment purposes. The State's interest in preventing perjury is a great one, and the use of a defend-

ant's silence for impeachment purposes imposes less of a toll upon the exercise of the privilege than does the use of that silence as proof of guilt. Thus, a distinction may validly be made between such cases. The considerations underlying both *Rutigliano* and *Griffin,* however, remain applicable, although to a different extent, when an attempt is made to utilize a defendant's silence for purposes of impeachment.

Thus, absent unusual circumstances such as those presented in the *Rothschild* case, we cannot countenance the use of silence even for impeachment purposes.[2] In the typical case, the probative value of such evidence will be minimal (see *United States v Hale,* 422 US 171, 176-177), and yet its prejudicial effect may be considerable. Although, as noted above, the State does have an interest in preventing perjury so strong that it may at times outweigh the somewhat attenuated interests of a defendant in preventing the use of his silence for impeachment purposes, this can be so only if the facts of the particular case are such that the defendant's silence has an unusually high probative value. In most cases, such as this one, silence when arrested is essentially ambiguous. The innocent suspect, as well as the guilty, is free to refrain from discussing the intricacies of his case with an arresting officer. Contrary to the opinion expressed by the dissent, we find no necessary contradiction between innocence and the decision to await a somewhat calmer moment and a more sympathetic audience before speaking.

2. It should be emphasized that this is an alternative basis for our decision in this case, since the due process considerations discussed previously would in all cases prevent the use of silence for impeachment purposes.

A suspect may well believe that it would be useless to attempt to justify his apparently criminal behavior to the arresting officer. For example, in the instant case, defendant was stopped with gun in hand following a running street battle. The likelihood that any explanation for his behavior could have then prevented an arrest was minimal at best. Hence, to speak may well have appeared futile to defendant. Moreover, it is an unfortunate truth that many people in our society, especially those involved in the life of the street, view the police as antagonists rather than protectors and react to police contact with extreme suspicion, distrust, and lack of cooperation. Such people will often believe, rightly or wrongly, that nothing they might say to the police on their own behalf would be accepted. Conversely, one who has had little or no dealings with the police might well be too shaken by the encounter to immediately raise a valid explanation, especially when the surrounding circumstances create the strong appearance of guilt. In short, the possible explanations for silence are many and varied, and a failure to speak, absent unusual circumstances, is as consistent with innocence as guilt. Because of the low probative value which may reasonably be attached to silence, the State's interest in utilizing that evidence for impeachment purposes is correspondingly weakened and will not justify the imposition of even so attenuated a penalty on the exercise of a defendant's right to remain silent (see Comment, Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence, 123 U of Pa L Rev 940, 974).

It is, of course, true that statements made by a defendant who has not been given *Miranda* warnings at the time

of arrest may nonetheless be used by the prosecution for impeachment purposes should the defendant take the stand on his own behalf (see *Harris v New York,* 401 US 222). While this rule implies the validity for constitutional purposes of distinguishing between the use of evidence as a part of the prosecution's direct case and the use of evidence for impeachment purposes only, it is certainly not contrary to the principle we enunciate today. This is so for several reasons. First, an inconsistent statement is much more probative than is silence. Moreover, a defendant's decision to remain silent at the time of arrest is in and of itself an assertion of a basic constitutional privilege. Thus, to allow that silence to be used against a defendant is to place a burden upon the direct exercise of a fundamental right. The *Miranda* warnings, on the other hand, constitute a prophylactic device designed to prevent constitutional violations and to protect the rights of an accused. In the absence of any actual coercion, a statement made by a defendant who has not been informed of his rights is not inherently suspect, nor does the use of such a statement against a defendant penalize that defendant for the exercise of a constitutionally protected right. Since the use for impeachment purposes of a statement made in the absence of *Miranda* warnings does not penalize an accused for the assertion of a constitutional right, whereas the use of a defendant's silence even for impeachment purposes only would burden the exercise of the defendant's privilege against self incrimination, it is appropriate to allow the use of such statements for impeachment purposes while precluding similar use of a defendant's silence.

In short, unless the introduction of evidence pertaining to a defendant's silence for impeachment purposes would materially advance the search for truth, it cannot be deemed to serve a sufficiently substantial State interest to justify the imposition of a penalty for the exercise of a constitutional right. In the typical case, as here, silence at the time of arrest will simply be too ambiguous to provide such a basis (see *United States v Hale,* 422 US 171, *supra;* cf. *Raffel v United States,* 271 US 494). Hence, we conclude that the use of defendant's silence for impeachment constituted an impermissible penalty for the exercise of his privilege.

Finally, we must reject the People's argument that the use of defendant's silence for impeachment purposes constituted harmless error at worst. Although there existed other evidence which might sustain a finding of guilt by the jury, it is evident that the nature and extent of the encounter between the defendants and their alleged victims was basic to the determination of guilt or innocence. The jury was presented with a pointed issue of credibility and was required to believe either the defendants or the prosecution witnesses. In this context, any evidence tending to impeach Conyers' credibility was extremely significant and may well have had a considerable influence upon the jury. Hence, even were we to find harmless error analysis to be appropriate in a case of this nature, in the absence of curative instructions we must conclude that in this case there is a reasonable possibility that this constitutional error contributed to defendant's conviction (see *People v Crimmins,* 36 NY2d 230, 240-241).

Accordingly, the order directing a new trial should be affirmed.

MEYER, J. (dissenting). Because the majority departs from the precedent established in *People v Rothschild* (35 NY2d 355) and does so on the wholly untenable basis that defendant's silence when arrested was too ambiguous to "materially advance the search for truth" (p 183; see, also, p 181), I respectfully dissent.

By its decision today the majority leaves the status of *Rothschild* unclear, for though it appears to have ruled that impeachment by silence remains permissible in the circumstances of *Rothschild* (p 181) it also speaks of re-examining *Rothschild* in the light of later Supreme Court cases (p 179), and its holding, if it does not establish a per se rule, necessarily limits *Rothschild* to *sui generis* status as a precedent. In my view neither the due process clause nor the privilege against self incrimination requires the result reached.[1] The right to impeach a defendant by his silence at the time of arrest should turn, as does the right to impeach him by prior criminal convictions, on a balancing of the prejudice to defendant on the one hand and the probativeness of his silence as a measure of his credibility on the other.[2] Here we deal not with silence in the face of

1. While the majority cites both Federal and State due process and self incrimination provisions, I do not understand its decision on either point to be based on the State Constitution, independent of the Federal, nor does there appear to be reason, the language of the two Constitutions being virtually identical in both respects, for interpreting them differently under the circumstances of this case.

2. The rule suggested is limited to time of arrest because the silence sought to be used in this case was at that time. No opinion is expressed concerning similar use of postarrest silence, but cf. Judge STEVENS dissenting in *Doyle v Ohio* (426 US 610, 632-633).

an accusation or inquiry at the time of arrest or the failure then to mention an alibi,[3] but with defendant's failure to call the arresting officer's attention to the fact that he was not the *perpetrator* but rather the *victim* of crime, followed by defendant's testimony at trial, in direct contradiction of prosecution witnesses, that that was, indeed, the fact. To refuse to permit the jury to consider defendant's silence at arrest under those circumstances is to fly in the face of human experience and of the public interest in truthful testimony embodied in the impeachment rule. It is, to put it bluntly, to provide defendants with a license to lie, not required by Constitution, statute or precedent.

I

The majority's due process analysis overextends the scope of the holding in *Doyle v Ohio* (426 US 610) and misapprehends the facts of the instant case. What *Doyle* held to be a due process violation was "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings" (426 US, at p 619). It explained the essence of the unfairness on which its due process reasoning was bottomed in a footnote (426 US, at p 619, n 10) as follows: "After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that

3. Accusation or inquiry may be differentiated from the situation of the instant case because it so much more readily lends itself to police abuse (see McCormick, Evidence [2d Cleary ed], §§ 161, 270). Alibi requires recall which may require more time and thought than is available at the time and under the circumstances of arrest.

right." But as Mr. Justice STEVENS, dissenting, observed (426 US, at pp 625-626): "if no warning had been given * * * nothing in the Court's opinion suggests that there would be any unfairness in using petitioners' prior inconsistent silence for impeachment purposes."

That there is no unfairness when no *Miranda* warning has been given results from the absence of misleading conduct on the part of the State; there simply is no "state action" upon which to predicate a due process claim. The novel suggestion by the majority that the constitutional provision against self incrimination is a promise by the State not to use one's silence against him (p 179) will not withstand analysis. The provisions speak of compulsion to be a witness against oneself and as history shows are addressed to the compulsion and coercion of the Star Chamber (see *Michigan v Tucker,* 417 US 433, 440; *People v Thomas,* 46 NY2d 100, 107). That means that, as *People v Rutigliano* (261 NY 103) teaches, silence cannot be used as evidence in chief; it does not mean that silence cannot be used to impeach when defendant becomes a witness on behalf of himself (*People v Rothschild,* 35 NY2d 355, *supra*), any more than a defendant who pleads insanity may refuse to answer questions put to him by court-appointed psychiatrists during a mental examination (*Matter of Lee v County Ct. of Erie County,* 27 NY2d 432). In short, the suggested implied promise unduly expands the constitutional provisions and ignores the part that waiver plays in the determination of their meaning (see, also, *infra,* pp 188, 189).

Nor can a substitute "state action" basis be found, as the majority opinion tries to do, either in the anomaly of

rewarding improper failure to warn by permitting it to justify admission of the evidence or in the accused's possible "accurate appreciation and exercise of his basic constitutional rights" (p 180). As to the first, it assumes that any failure to warn is an improper police practice[4] and that that failure is the sole justification for admission of the evidence. But what we deal with in the instant case is a claim at trial which, if true, would have been made at or before arrest, spontaneously upon the appearance of the police, and as to which, therefore, the custody which triggers the *Miranda* warning obligation simply had not begun (cf. *Bradley v Jago,* 594 F2d 1100, 1103). There was, in any event, no improper practice in the present case because though defendant was taken into custody the police made no attempt to question him and he, therefore, never became entitled to *Miranda* warnings from them.

To speak of the failure to warn as justifying admission of evidence of silence misconceives the rationale of the impeachment rule and the purpose of cross-examination, moreover. The justification for admission of such evidence is the truth-seeking function of the trial and the relationship between credibility of trial testimony and defendant's prior inconsistent conduct in remaining silent under circum-

4. It is highly improbable that an officer will deliberately omit warnings in the hope that the person he arrests will remain silent so that his silence can later be used to impeach his trial testimony. Improper police practices when engaged in are intended to produce not silence but statements. But even were that not so, as the Supreme Court stated in *Harris v New York* (401 US 222), affirming our decision in 25 NY2d 175, "the benefits of this process [impeachment] should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby * * * sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief" (401 US, at p 225).

stances in which he would have, were his trial testimony true, felt compelled to say so at the time of his arrest (see *Doyle v Ohio,* 426 US 610, *supra; People v Wise,* 46 NY2d 321). Human experience teaches that an important factor in evaluating a present exculpatory statement is its consistency with any prior statement on the one hand, and the failure, on the other, to make a prior consistent statement at a time when the motivation to do so was strong. The failure to warn does not "justify" admission of the evidence, therefore. It simply removes the obstacle, in the nature of estoppel, that blocks use of the evidence: the unfairness of telling defendant he may remain silent and then using the fact that he did so to his detriment.

Permitting impeachment by silence involves no anomaly, therefore. But there is a very real anomaly involved in the majority's due process argument that it is common knowledge "absorbed from our common culture" that an arrested person is not required to speak to the police, for the predicate of *Miranda* is that it cannot be presumed that a defendant knows his rights upon arrest and that he must, therefore, have spelled out for him the precise guarantees the Constitution affords him.

Absent a showing that by giving *Miranda* warnings or by other representation to the person arrested the police have misled him into remaining silent, there is no basis upon which any due process violation can be found. There has been no such showing in this case.

II

No more does the privilege against self incrimination support reversal of Conyers' conviction. What the majority has done in reaching its conclusion is to apply the exception as though it were the rule.

The rule as the Supreme Court has made clear in many different ways is that a defendant who testifies in his own defense subjects himself to the same obligation to speak the truth and the same searching cross-examination to determine whether he has as does any any other witness. The exception is that the State may not cross-examine in areas in which by its own affirmative action or representation it can be said to have coerced or misled the defendant, or which are so tenuously probative as not to justify the resulting prejudice to defendant.

The underpinnings of the rule were well stated by Mr. Justice FRANKFURTER in *Brown v United States* (356 US 148, 154-156):

"If [a defendant in a criminal case] takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. '[H]e has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.' *Fitzpatrick v. United States,* 178 U.S. 304, 315; and see *Reagan v. United States,* 157 U.S. 301, 304-305. The reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf.

* * *

"[W]hen a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a human safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell."

On similar reasoning the Supreme Court has upheld the use for purposes of attacking the credibility of defendant's trial testimony of a statement inadmissible on the prosecution's case in chief because of the lack of *Miranda* warnings (*Harris v New York,* 401 US 222, affg 25 NY2d 175, *supra*) or because obtained in contravention of defendant's right to counsel (*Michigan v Tucker,* 417 US 433, *supra; Oregon v Haas,* 420 US 714). We, likewise, have held that "[o]nce a particular statement is found appropriate for impeachment purposes, any *Miranda* infirmity becomes irrelevant" (*People* v. *Wise,* 46 NY2d 321, 329, *supra*).

Out of these cases has developed the concept that a defendant who takes the stand waives his privilege against self incrimination not only as it protects against prior official action, short of coercion or affirmatively misleading conduct, in improperly obtaining statements from him,

but also as he has previously affirmatively taken refuge in its protection. Thus, testimony given before a Grand Jury under a grant of immunity is compelled and cannot constitutionally be used to impeach (*New Jersey v Portash,* 440 US 450) and because silence after *Miranda* warnings has probably been induced by the giving of the warnings, it cannot constitutionally be used to impeach (*Doyle v Ohio,* 426 US 610, *supra;* cf. *Johnson v United States,* 318 US 189), but defendant's failure at his first trial to take the stand to deny testimony as to an incriminating admission can be used on cross-examination at his second trial, where he did take the stand, to impeach his testimony denying the same admission (*Raffel v United States,* 271 US 494).

Raffel assumed a significant inconsistency between defendant's testimony at the second trial and his silence at the first which later decisions of the Supreme Court in the exercise of its supervisory function relating to Federal trials have called into question (see *United States v Hale,* 422 US 171, 175; *Stewart v United States,* 366 US 1, 6; *Grunewald v United States,* 353 US 391, 420), but that does not diminish the force of its holding that when a defendant in a criminal case takes the stand he waives his privilege against self incrimination and like any other witness may be impeached by his prior silence,[5] provided only that there *is* a significant inconsistency between his trial testimony and his prior silence. Nor can it be said that when there is a

5. Compare *Grunewald v United States,* 353 US 391, 420. Note that despite a dissent by Mr. Justice BLACK, joined by the Chief Justice and Justices DOUGLAS and BRENNAN, urging that *Raffel* should be overruled, the court in *Grunewald* failed to do so, holding simply that *Raffel* was not controlling because there was no true inconsistency.

sufficiently significant inconsistency between prior silence and trial testimony the fact that its use burdens the exercise by defendant of a constitutional right proscribes doing so. The Supreme Court has recognized a number of times (as the majority apparently agrees) that not every burden upon the exercise of a constitutional right is impermissible (*Chaffin v Stynchcombe,* 412 US 17, 29; *McGautha* v. *California,* 402 US 183). Indeed, *McGautha* expressly held that "It does no violence to the privilege that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence which is damaging to his case" (402 US, at p 213) and that it is not impermissible to require that a defendant in determining whether to take the stand in his own behalf "take into account the matters which may be brought out on cross-examination" (402 US, at p 215).[6]

The balance to be struck is between defendant's decision whether to testify at trial and the strong policy against countenancing perjury. While there may be, as the majority suggests, possible prejudice to a defendant in the use of his pretrial silence in that the prosecutor, and ultimately the jury, may give it more emphasis than it deserves, de-

6. That part of what may be brought out on cross-examination is silence at the time of arrest does not compel the difference in result suggested by the majority in distinguishing *Harris v New York* from the instant situation (pp 182, 183). True *Harris* concerns deterrence from constitutional violation whereas we are concerned with defendant's silence in a situation in which silence is unnatural, which could be in the intentional exercise of a constitutional right, but the only compulsion involved in the latter is far from an impermissible one. All that is required is that defendant include in the considerations by which his decision to remain silent at arrest is arrived at the possibility that doing so may be used for impeachment when there is sufficiently great discrepancy between trial testimony and arrest silence to make the latter probative. In short, such burden as there is does not have the proportion attributed to it by the majority.

fendant of course has the right to offer any explanation he sees fit, to object if the summation distorts the situation and to request appropriate instructions for the guidance of the jury,[7] whereas the State's interest in truthful testimony as embodied in the impeachment rule is wholly defeated if the use of pretrial silence is proscribed.

The ultimate measure of admissibility, therefore, is the extent to which the pretrial silence can be said to be inconsistent with the testimony given at trial, or, to put it another way, the reliability or probative value of the pretrial silence. *Grunewald v United States* (353 US 391, *supra*), *Stewart v United States* (366 US 1, *supra*), *United States v Hale* (422 US 171, *supra*), and our own decision in *People v Wise* (46 NY2d 321, *supra*) suggest the bases for determination of this question. *Grunewald* held that there was no inconsistency between defendant Halperin's claim of privilege before the Grand Jury and his trial testimony because had he answered the questions put to him before the Grand Jury in the same way he subsequently answered them at trial, he nevertheless would have provided the Government with incriminating evidence; for example, since answering the Grand Jury question whether he knew Grunewald, one of the conspirators, would have tended to incriminate him by linking him to the conspiracy his claim of priv-

7. See, e.g., *Regina v Cripps* (3 Cr Rep NS 367, 371), in which the British Columbia Court of Appeal quoted approvingly the following passage from an earlier case: "it is wrong to say to a jury 'Because the accused exercised what is undoubtedly his right, the privilege of remaining silent, you may draw an inference of guilt'; it is quite a different matter to say 'This accused, as he was entitled to do, has not advanced at any earlier stage the explanation that has been offered to you today; you, the jury, may take that into account when you are assessing the weight that you think it right to attribute to the explanation'."

ilege was not inconsistent with his trial testimony that his acquaintance with Grunewald was free of any criminal element. The court noted also that Halperin repeatedly insisted before the Grand Jury that he was innocent and claimed privilege only because his attorney so advised, that Grand Jury proceedings are not adversary or protected by presence of counsel, and that Halperin was when called before the Grand Jury a potential defendant. *Stewart* found no inconsistency because the defendant, whose defense was insanity, testified only in gibberish, so the jury had nothing to evaluate but his demeanor. *Hale* found no inconsistency in defendant's silence after arrest with respect to his exculpatory trial explanation that the money found in his possession and about which he was questioned at the police station had come from his wife, because he had just been given *Miranda* warnings, knew he was a potential defendant because he had been the subject of an eyewitness identification, did assert his innocence and was in a "secretive" as distinct from an adversarial setting. Those facts plus Hale's prior contacts with the police and his participation in a narcotics rehabilitation program led the court to conclude that, on the facts of the case, there was no inconsistency since Hale "had no reason to think that any explanation he might make would hasten his release" and 'had substantial indication that nothing he said would influence the police decision to retain him in custody" (422 US, *supra,* at p 179). Our decision in *Wise* concerned defendant's denial at trial that he had, without *Miranda* warnings, made a prior inconsistent statement that linked him to the murder weapon, and is of value for purposes of the present discussion only for its definition of inconsistency

(46 NY2d, *supra,* at pp 327, 328): "Simply put, where a defendant's trial testimony offers one version of the events in question, and his prior remark to a police officer suggests a contrary view of these events, the jury is entitled to hear the previous statement so that it may fully assess the witness' credibility."

The majority states without analysis that defendant's silence when arrested was "essentially ambiguous" (p 181) and "too ambiguous" to "materially advance the search for truth" (p 183). Measured by the above criteria or on any other reasonable basis for evaluation that assessment is untenable, for there was simply no reason for defendant to acquiesce in his arrest without stating the version of the facts he testified to at trial if that version was the truth. When apprehended defendant, gun in hand, was being chased by one of the complaining witnesses, Dantzler. Ordered by the police, who had been alerted to the situation by a third party, to halt, defendant complied and dropped the weapon. On searching him, the officers found a black vinyl purse and some cash. Defendant was arrested and told at the time that he was being arrested for robbery, possession of a weapon, assault and attempted murder. Though he offered no such explanation when arrested, defendant testified at the trial that he had placed a numbers bet with Dantzler and when his number hit went to Dantzler's apartment to collect. Dantzler argued with him at first, but then told him, pointing to a pouch on a table, to go get the money. When he reached for the pouch, however, Dantzler drew a gun. Defendant knocked the gun from Dantzler's hand, picked it up and placed it and the pouch in his pocket, and then, to prevent Dantzler from following them the co-

defendant, Saunders, who had driven defendant to Dantzler's apartment, tied Dantzler up with rope. As defendant and Saunders were walking toward Saunders' car Dantzler emerged from the building screaming that he wanted his gun back. Some police officers appeared, Dantzler yelled at them that he had been robbed and defendant was arrested. Defendant denied ever having seen Grace Johnson until he was in custody.

The prosecution testimony which defendant sought to refute was that Dantzler and Grace Johnson were standing outside an apartment building talking when they were ordered by two young men, at gunpoint, to step inside, that once inside they were bound, money was removed from Dantzler's pockets and Grace Johnson's black bag containing money was taken, that Dantzler untied himself and as he emerged from the building saw defendant and Saunders turning the corner, was given a lift in that direction by a tow truck operator to whom he stated he had been robbed, but jumped off and proceeded on foot because the tow truck could not follow defendant and Saunders who were running against traffic, that Dantzler continued the chase on foot while the tow truck operator searched for police, that the tow truck operator was talking to police when he again spotted defendant gun in hand, that Johnson during all this time remained bound in the apartment building until released by a woman who entered the building.

It is not necessary to recount all of the many discrepancies in defendant's trial version, including the total failure to explain why Grace Johnson would have tied herself up or what motive she and the tow truck operator and the woman who untied Ms. Johnson would have had for framing de-

fendant. Such discrepancies are for the jury to consider in making the ultimate determination, and play a negative part in determining the permissibility of impeachment by silence in that the issue disappears if there are no such discrepancies, but are essentially hindsight. The inconsistency by which is determined whether silence has probative value to impeach is, however, to be measured at the time of the silence rather than at trial.

So measured, the obligation imposed by the human instinct for self-preservation to avoid arrest by explaining that the gun belonged to Dantzler and that defendant's running away from Dantzler, though Dantzler was unarmed, had an innocent explanation was at least as great as that imposed by his official duties upon the policeman involved in *People v Rothschild* (*supra*).[8] It is, moreover, an instinct which the law has recognized in other ways: in permitting testimony of the complaining witness in a rape trial that immediately after the crime she made complaint to a third person (*People v Deitsch*, 237 NY 300; Richardson, Evidence [10th ed—Prince], §§ 292, 519); in permitting testimony by a defendant who claims that his confession was coerced, that he complained of the mistreatment at the first suitable opportunity (*People v Alex*, 260 NY

8. The short answer to the majority's suggestion that silence in the instant case is essentially ambiguous is that we deal here not with one claiming simply innocence but with a person who claims to have been the *victim* of crime. The probability that such a person will withhold stating so to await a calmer moment, because he believed an explanation useless, or because he feels animosity toward the police is not so great that use of his silence to impeach him should be proscribed, though, of course, he may put such explanations before the jury for their use in evaluating his credibility. By taking the stand the defendant has waived his privilege against self incrimination to the extent necessary to evaluate his testimony.

425; Richardson, *op cit.*, § 519). The basis for the rule and the significance of the absence of complaint was well stated in *Alex* (260 NY, at pp 428-429): "When that issue [coercion of a confession] is involved, the question of whether a defendant made complaint of mistreatment at the first opportunity or within a reasonable time is material and relevant. It is of great assistance to the jury in determining whether a defendant's claim that a confession was induced by threats and fear is the truth or an afterthought, a concocted story to escape the effect of the confession. If complaint is not timely made, when it is made suspicion is aroused that it is a subterfuge."

While those cases deal with admission of evidence concerning the *making* of a statement as *corroborating* evidence whereas we are concerned with the *absence* of a statement as *impeaching* evidence, they are important to a determination of the proper rule relating to impeachment by silence because they proceed from a common human trait: it is natural to expect that one who has been outraged in person or property will make prompt disclosure or explanation, the more so when his or her failure to do so will result in his or her own arrest. Nor is the drawing of an adverse inference from the silence of a criminal defendant unknown to the law; for example, the inference of guilt from recent and unexplained possession of the fruits of crime (Penal Law, § 165.55; *People v Moro,* 23 NY2d 496). Clearly, therefore, defendant's silence at arrest can "materially advance the search for truth" and is, therefore, admissible, unless there were also present countervailing considerations of the *Grunewald-Stewart-Hale genre* to weaken its

probative value and require its exclusion in this particular case.

No countervailing considerations were present here. To state that Dantzler had pulled a gun on him and he had taken it away from Dantzler would not have incriminated defendant. He made no statement of innocence or guilt and at the moment of his arrest had not so far as he knew been identified by anyone as the perpetrator of a crime, nor had he received *Miranda* warnings. The most that can be said in favor of excluding the evidence of his silence, therefore, is that since he was carrying a gun he knew he was a potential defendant, that the "proceedings" were not adversarial (though they can hardly be deemed "secretive") and that (as the majority assumes) he was in fact aware of the Fifth Amendment. The first furnishes no basis for exclusion because the explanation of possession of the gun offered at trial would have obtained his release and Dantzler's incarceration. The second has little or no bearing on the natural instinct to explain in the situation in which defendant found himself at the time of arrest. As to the third, it is sufficient in the truth-seeking process of a trial to provide defendant with the opportunity to put before the jury the motivation for his silence.[9] To give it the exclusionary effect that the majority does, however, is to emasculate the rule.

In final analysis, the only advantage of the majority's rule, if it is a per se rule, is ease of application, but its

9. As Mr. Justice STEVENS, dissenting in *Doyle*, suggests (426 US, at p 626) exclusion is not warranted because the risk that a truthful defendant will be deceived by his understanding of the Fifth Amendment and also will be unable to explain his honest misunderstanding is so much less than the risk that exclusion of the evidence will merely provide a shield for perjury.

adoption on that basis alone would be procrustean. If on the other hand, the rule it adopts is intended to allow impeachment of a defendant by silence in "unusual circumstances", as appears to be the case, the failure to categorize the instant case as one such or to furnish guidelines concerning what may be so categorized can only result in confusion for the trial Bench and Bar.[10]

III

It is necessary to note additionally only that nothing in statute, or with two clearly distinguishable exceptions, in case law of our court requires the result the majority reaches. The only statute which touches the subject is CPL 60.15 (subd 2) which is, however, concerned only with the impermissibility of drawing any inference from defendant's failure to testify in his own behalf at trial.

Of the cases relied upon by the majority or in defendant's brief many are inapposite because they concern use of silence as part of the prosecution's direct case, a wholly different proposition from that here under discussion, or are general statements, broader than necessary for the case in which said and made without reference to a situation such as that of the instant case, so far as appears from the decision. In the first category fall *People v Rutigliano* (261 NY 103, *supra*); *People v Travato* (309 NY 382); *People v Bianculli* (9 NY2d 468); *People v Christman* (23 NY2d 429), which are also distinguishable on the grounds that

10. For example, the majority's direct burden rationale, discussed in footnote 6 above, would outlaw *Rothschild's* use of silence to impeach even though defendant in that case had a duty-imposed obligation to speak.

they involve failure to respond to accusations or to assert an alibi (see n 3 above) and that their reasoning relates to a failure to respond to statements made to them, rather than failure to speak spontaneously as the supposed situation would require (e.g., *People v Rutigliano,* 261 NY, *supra,* at p 107, "his silence should not be counted as giving assent to what he hears"). In the second, fall *People v Arce* (42 NY2d 179, 187) and *People v Thomas* (46 NY2d 100, 109, *supra*).

Of the four cases in which we have considered the use on cross-examination of prior silence as a means of impeachment two (*People v Rothschild,* 35 NY2d 355, *supra;* and *People v Fiore,* 34 NY2d 81) have permitted such use, and two (*People v Petersen,* 4 NY2d 992; and *People v Hyman,* 308 NY 794, affg without opn 284 App Div 347) have not. *Hyman* appears from the Appellate Division decision to have concerned cross-examination of defendant-doctors, who at trial testified that the alleged abortion was therapeutic, concerning whether they had refused while in custody to admit knowing the person upon whom the abortion had been performed, and we are told by the dissent in the Appellate Division (5 AD2d 698) that *Petersen* concerned cross-examination of a defendant charged with driving while intoxicated, who testified at trial that someone other than he had been driving the car, whether he had made any such assertion on the occasion of his arrest and while in custody. *Petersen* is closer to the spontaneous impulse that would have operated in the instant case had Conyers' trial testimony been true than is *Hyman,* but both are distinguishable because as indicated by the authorities upon which they relied (cases such as *Rutigliano,* excluding use

as direct evidence of prior silence) they gave no apparent consideration to the distinction between use on direct and use for impeachment purposes on cross.

Fiore and *Rothschild* on the other hand, allowed impeachment of defendant. *Fiore* may be distinguished from the instant case because it was defendant, seeking on redirect examination to bolster the exculpatory version testified to by him, who testified that he had not been asked before indictment to make any statement, whereas he had been called before the Grand Jury but was not permitted to testify because he refused to waive immunity. We held that it was permissible to impeach defendant by showing the latter fact even though it could not have been revealed as evidence in chief. The value of *Fiore* to the present discussion is limited to its distinction between evidence in chief and impeachment and its conclusion that not every burden upon the right to remain silent is impermissible.

Rothschild is more closely in point for it permitted cross-examination of a police officer defendant, who had testified on direct that he had received money only to set the giver up for a bribery charge, to show that he had not revealed the scheme to his superiors, or to his fellow officers at the time of arrest. In so holding we relied (35 NY2d, *supra,* at p 360) upon the patent inconsistency between silence and the defense asserted and defendant's patent obligation to speak and noted with interest similar holdings in *United States ex rel. Burt v State of New Jersey* (475 F2d 234) and *Agnellino v State of New Jersey* (493 F2d 714).

It would unduly extend this already too long opinion to discuss in detail *Burt* and *Agnellino,* and in any event, our

noting of those cases "with interest" is not the same as noting them with approval. Nonetheless, it is worthwhile pointing out that though neither involved the "patent obligation to speak" to which we referred in *Rothschild,* each found the inconsistency involved to be as "highly probative" as did we the inconsistency in *Rothschild* (35 NY2d, *supra,* at p 360). In sum, the obligation to speak imposed by duty in *Rothschild* was no more compelling than that imposed by Conyers' own self-interest were his trial testimony true and, therefore, furnishes no basis for distinguishing *Rothschild* from the instant case. Just as in *Rothschild* defendant's testimony was "diametrically inconsistent with that produced by the prosecution", and his silence upon arrest was "patently inconsistent with the defense asserted" (35 NY2d, *supra,* at p 360), so in the present case is Conyers. Having distinguished between direct and impeachment use of silence in that case to reach a sound and proper result, we now effectively reverse that result.

For the foregoing reasons, I would reverse the order of the Appellate Division insofar as it is appealed from, and would remit to the Appellate Division for further proceedings.

Chief Judge COOKE and Judges WACHTLER and FUCHSBERG concur with Judge GABRIELLI; Judge MEYER dissents and votes to reverse in a separate opinion in which Judges JASEN and JONES concur.

Order affirmed.

APPENDIX B

Remittitur of the Court of Appeals

Remittitur amended by order of the Court dated,

March 20, 1980

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

No. 450

THE PEOPLE &c.,

Appellant,

vs

THOMAS CONYERS,

Respondent.

The appellant in the above entitled appeal appeared by Robert M. Morgenthau, District Attorney, New York County; *the respondent appeared by* William E. Hellerstein and Philip Weinstein, The Legal Aid Society.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Gabrielli, J. All concur except Meyer, J., who dissents and votes to reverse in an opinion in which Jasen and Jones, JJ., concur. Upon the appeal herein there was presented and necessarily passed

Court of Appeals Remittitur

upon a question under the Constitution of the United States, viz.: Whether cross-examination of a criminal defendant, for impeachment purposes, concerning his silence at the time of arrest, is violative of defendant's federal constitutional rights. The Court of Appeals considered this question and concluded that such questioning does violate defendant's federal constitutional rights.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA

Joseph W. Bellacosa, Clerk of the Court
Court of Appeals, Clerk's Office, Albany, January 8, 1980.
April 21, 1980 *nunc pro tunc* March 20, 1980

JOSEPH W. BELLACOSA

APPENDIX C

Order and Opinion of the New York Supreme Court, Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 21, 1978

Present—Hon. Theodore R. Kupferman, Justice Presiding
Harold Birns
Arnold L. Fein
Myles J. Lane
Leonard H. Sandler, Justices

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

THOMAS CONYERS,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, New York County (Scott, J.), rendered on April 26, 1976, convicting defendant, after a jury trial, of robbery in the

first degree, robbery in the second degree, attempted assault in the first degree, possession of a dangerous weapon in the second degree, and possession of a dangerous weapon in the third degree, and said appeal having been argued by Mr. Randolph Volkell of counsel for the appellant, and by Meredith Anne Feinman of counsel for the respondent; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed, on the law, the sixth count of the indictment charging defendant with attempted felony assault dismissed as jurisdictionally defective, and the matter remanded for a new trial.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Appellate Division Opinion

FEIN, J.

Defendant Conyers appeals from a judgment convicting him following a jury trial on two counts of robbery in the first degree, two counts of robbery in the second degree, attempted assault in the first degree, possession of a dangerous weapon in the second degree and possession of a dangerous weapon in the third degree. The issue here is the propriety of the cross-examination by the prosecutor as to defendant's silence at the time of his arrest. Did such cross-examination infringe upon defendant's constitutional right to remain silent?

The evidence on behalf of the prosecution was that on August 28, 1975, defendant and codefendant Saunders accosted Marion Dantzler and Grace Johnson in the street at gunpoint and directed them to enter a hallway at 328 East 126th Street in Manhattan. Defendants allegedly took money from Dantzler and a purse containing cash from Johnson. After tying up the victims, defendants fled. Dantzler, however, untied himself and ran from the building in pursuit of Conyers and Saunders. A tow truck operator, Frank Moreau, aided in the chase. It appears that Saunders fired a shot at Dantzler during the chase, although Moreau testified he thought that Conyers had fired the shot. Police officers who subsequently joined in the chase apprehended both Conyers and Saunders. A search of Conyers yielded the gun and Johnson's purse containing $92.70. Saunders was found in possession of $89.04 and a piece of white rope similar to that which had been used to tie up Dantzler. Defendants were taken to the precinct where Johnson and Dantzler identified them. Dantzler told the police that

$250 to $300 had been taken. Johnson claimed about $200 had been removed from her purse.

The defense version of the events differed. Conyers testified that he had placed a bet with Dantzler the day before the alleged robbery. After ascertaining that he had won, he went to Dantzler's "numbers spot" on the third floor of 320 East 126th Street to collect. An argument ensued when Dantzler denied taking the bet. After about five minutes, Dantzler pointed to money on a table and told Conyers to go get it. Conyers saw a black pouch on the table. As he reached for it Dantzler drew a gun. Conyers testified that he knocked the gun out of Dantzler's hand and that the gun discharged as it hit the floor. Conyers picked up the gun and the pouch while Saunders took some rope and tied Dantzler's hands. Defendants left the apartment heading for Saunders' car. When they observed Dantzler chasing them, screaming that he wanted his gun back, Conyers and Saunders ran, pursued by Dantzler, until police officers apprehended them at 124th Street.

On cross-examination, the prosecutor inquired over objection as to whether Conyers had told the police that the gun was not his, that it was Dantzler who had drawn the gun and Conyers had taken it from Dantzler in self-defense:

"Q. Did you, at any time, tell the police that the gun was not yours, that in fact Mr. Dantzler had drawn the gun on you and that you had taken the gun away from him more or less in self defense? * * *

"A. I didn't say anything to the police officers.

"Q. Did you, at any time, tell the police that the money and the pouch, the money in the pouch was yours and that it was owed to you as a debt?

"A. No."

Conyers contends that the cross-examination concerning his silence when arrested was improper since it infringed upon his constitutional right to remain silent, his privilege against self incrimination. He asserts that the court committed reversible error when it permitted, over Conyers' objection, inquiry by the prosecutor as to Conyers' silence when he was arrested. The District Attorney contends that the inquiry was not directed against Conyers' exercise of his right to remain silent. The prosecutor's purpose was not to interfere with defendant's right to remain silent, but rather to demonstrate that defendant's story was a recent fabrication. The inquiry sought only to ascertain whether Conyers told the police that (1) the gun was not his; (2) he had taken it away from Dantzler in self-defense after the latter had drawn the gun on him; (3) the money in the pouch was owed to him in payment of a debt.

In her summation, alluding to the defense testimony, the prosecutor relied on Conyers' failure to speak at the time of his arrest to demonstrate that his story was a recent fabrication. The inquiry and summation plainly raised before the jury and called to its attention the fact that Conyers had remained silent at the time of his arrest and had not offered to the police the exculpatory account of the events as related by him upon the trial.

Such cross-examination and summation improperly impinged upon Conyers' right to remain silent. He had no

obligation to speak. Under the circumstances of this case, it constitutes prejudicial error.

A defendant's silence at the time of his arrest may not be used against him in subsequent judicial proceedings (*People v Rutigliano,* 261 NY 103). Such silence at the time of arrest may not be used to impeach a defendant upon the trial (*Doyle v Ohio,* 426 US 610). To hold otherwise would penalize a defendant for the exercise of his constitutional privilege to remain silent while under custodial interrogation. In *People v Arce* (42 NY2d 179) counsel for codefendant Arce inquired of Camara as to whether Camara, at the time of his arrest, told the police about the shootings. After an objection to the question was overruled, Camara answered in the negative. However, subsequently, when the Assistant District Attorney posed a similar question to Camara, the Trial Judge sustained the objection and instructed the jury to the effect that when a person is under arrest he is not legally obligated to say anything to the police or to anyone else and that no unfavorable inference may be drawn against a defendant by reason of his silence. The Court of Appeals ruled that the question propounded by the prosecutor was "improper" even though unanswered, since it brought "to the attention of the jury" the fact that defendant Camara had been silent at the time of his arrest. However, although the court found error in even asking the question, it was ruled to be nonprejudicial by reason of the clear and direct curative instructions to the jury which were given by the trial court. (*People v Arce,* 42 NY2d 179, 187, *supra.*)

Here, however, the trial court overruled the objection, in effect directing defendant to respond as to his failure to

relate to the police his exculpatory account of the events. Defendant's testimony was in direct conflict with that of the victim, Dantzler. The credibility of defendant and Dantzler, therefore, was a prime issue. Under the circumstances, in a case where resolution of the issue may well have depended upon the jury's evaluation of defendant's credibility as opposed to that of the chief prosecution witness, the inquiry relating to Conyers' postarrest silence may have had such a significant prejudicial effect as to deprive him of his right to a fair trial. To cross-examine a defendant as to his postarrest silence and to comment upon such silence in summation penalizes a defendant for exercising his Fifth Amendment privilege to remain silent when he is under police custodial interrogation (*Miranda v Arizona,* 384 US 436, 468). It is an error of constitutional dimensions, violative of the due process clause of the Fourteenth Amendment. (See *Doyle v Ohio,* 426 US 610, 619, *supra.*) Under the circumstances of this case, the error is not harmless beyond a reasonable doubt. (*Chapman v California,* 386 US 18; *People v Crimmins,* 36 NY2d 230.)

As stated by the Second Department in *People v Smoot* (59 AD2d 898, 899): "Although not every violation of a defendant's constitutional rights at trial constitutes reversible error (see *Chapman v California,* 386 US 18, 24), we hold that in this case, where the evidence against defendant cannot be characterized as overwhelming, where a review of the testimony of the principal witnesses against him reveals certain inconsistencies and contradictions, and where so much depended upon the jury's evaluation of the credibility of the two main prosecution witnesses on the one

hand, and of the defendant and his two alibi witnesses on the other, that there was substantial prejudice to the rights of the defendant so as to deprive him of a fair trial. The law is clear that the prosecution may not comment upon the postarrest silence of a defendant and that a defendant has no obligation, when in custody, to tell either the police or the District Attorney that he has an alibi or other exculpatory defense. To cross-examine the defendant about his postarrest and pretrial silence concerning his alibi defense and to comment upon such silence in summation is fundamentally unfair and a denial of the right to due process (see *Doyle v Ohio,* 426 US 610; *United States v Hale,* 422 US 171; *People v Christman,* 23 NY2d 429, 433; *People v Rutigliano,* 261 NY 103;*People v Gambino,* 52 AD2d 957, 958; *People v Felcone,* 43 AD2d 976, 977)."

Similarly here, although our case does not involve an alibi defense, cross-examination and summation by the prosecution highlighted for the jury the silence of defendant at the time of his arrest and his failure to offer to the police the exculpatory statement testified to at trial, despite the well-settled law that a defendant in custody has no obligation to speak. This is not a case where a defendant because of his office or job may have a duty to speak. (See *People v Rothschild,* 35 NY2d 355.)

The cross-examination extracted from defendant the fact that he said and did nothing. The summation used defendant's silence and inaction to ground an attack upon his credibility and to buttress Dantzler's credibility in his contrary account of the events. Since defendant was plainly under no duty to talk at all, the cross-examination and

summation by the prosecutor as to defendant's silence at the time of his arrest was improper and constituted a denial of defendant's right to a fair trial. The error was compounded by the inquiry and comments concerning defendant's refusal to sign the police property clerk's voucher for the money and pouch taken from him by the police at the time of his arrest.

Upon this record there must be a new trial. Upon remand the sixth count for attempted felony assault must be dismissed as jurisdictionally defective. Like attempted felony murder, there is no such crime as attempted felony assault. (Penal Law, § 120.10, subd 4; see *People v Hassin,* 48 AD2d 705; *People v Hendrix,* 56 AD2d 580.)

We note that the points relied on here were not raised in *People v Saunders* (63 AD2d 868, mot for lv to app den 44 NY2d 956).

Accordingly, the judgment, Supreme Court, New York County (Scott, J.), rendered April 26, 1976, convicting defendant Conyers should be reversed, on the law, the sixth count of the indictment charging defendant with attempted felony assault dismissed as jurisdictionally defective, and the matter remanded for a new trial.

Kupferman, J. P., Birns, Lane and Sandler, JJ., concur.

Judgment, Supreme Court, New York County, rendered on April 26, 1976, unanimously reversed, on the law, the sixth count of the indictment charging defendant with attempted felony assault dismissed as jurisdictionally defective, and the matter remanded for a new trial.

APPENDIX D

Excerpted Portions of Trial Transcript

CONYERS—DEFT—CROSS

* * *

(477) Q. The point in time Mr. Dantzler started screaming, he screamed, I believe you said, "He robbed me," or something to that effect? A. Yes.

Q. Was the police car still stationary? A. Yes; he was.

Q. It was after you heard him say something that the police car started to back up? A. I wasn't watching. I wasn't aware of it.

Q. But you were not running toward the police car. A. No.

Q. So, he yelled and there came a time after you heard him yell that the police car started moving and came toward to. It was backing up; is that correct? A. Yes.

* * *

(479) Q. Did you, at any time, tell the police that it was Mr. Dantzler who had the gun on you and that you were—

Mr. McClary: Objection, Judge.

Q. Did you ever tell the police that it was Mr. Dantzler who had originally taken, drawn (480) the gun on you and that you had in fact taken the gun away from him in self defense?

Mr. McClary: Objection, Judge.

The Court: What is the basis?

Mr. McClary: The basis of the objection is that the defendant is advised of his right not to talk to the police. And there is no foundation here as to whether the police asked him what happened.

The Court: Overruled.

Mr. Zuckerman: May we be heard before the bench, if Your Honor please?

The Court: Yes.

(Bench conference, off the record, out of hearing of the jury.)

The Court: Overruled.

Mr. Zuckerman: Exception.

The Court: You may have an exception.

Q. Mr. Conyers, do you recall the question? A. No.

Miss Mages: Would you repeat the question?

Q. Did you, at any time, tell the police (481) that the gun was not yours, that in fact Mr. Dantzler had drawn the gun on you and that you had taken the gun away from him more or less in self defense?

Mr. McClary: Objection, for the record.

Mr. Zuckerman: Objection for the record.

The Court: Overruled. You may have an exception.

Mr. McClary: Thank you. I take exception.

The Court: You may answer.

A. I didn't say anything to the police officers.

Q. Did you, at any time, tell the police that the money and the pouch, the money in the pouch was yours and that it was owed to you as a debt? A. No.

Mr. McClary: I make the same objection.

Mr. Zuckerman: Objection.

The Court: Overruled. You may have an exception.

Mr. Zuckerman: Exception.

Q. Did you, at any time, attempt to press criminal charges against Mr. Dantzler (482) for his drawing a weapon up you.

Mr. Zuckerman: Objection Judge.

The Court: Overruled. You have an exception.

A. I didn't do anything.

SUMMATION—PEOPLE

(786) And finally, the defendants would have you believe that they were the persons who had been wronged, that a gun was drawn on them, that Thomas Conyer was being denied an honest debt that was owed to him. Let's examine this more carefully. They did not tell this to the Police. I suggest to you that it was a recent fabrication, something that they made up to attempt to explain away the damaging evidence. And what is the damaging evidence? The rope from the pocket of defendant Saunders, the black purse containing (787) money from the pocket of the defendant Conyer, and the gun in the hand of defendant Conyer.

And let's examine their actions when they saw the Police. They saw the Police coming from their right, and what did they do? They made no attempt to hail down the police car. In fact, both defendants, on that stand, admitted that on seeing the police car they ran in an opposite direction, and I suggest to you that those are not the actions of persons who had been wronged. Those actions are clearly consciousness of guilt.

* * *

Trial Transcript

(800) Mr. Zuckerman: May I also note, for the record purposes, my objection to the District Attorney telling the jury that they were under obligation or should have said they were innocent when confronted by Marion on the street or in the police station. I respectfully submit that the defendant is under no obligation to say anything and merely being there, being accused, that his silence is not to be deemed an admission or an implication of any kind as to his guilt.

The Court: You have your objection, if you made an objection, and I overruled it. You have your exception.

* * *